IN THE

United States Circuit Court of Appeals

FOR THE SEVENTH CIRCUIT

OCTOBER TERM, 1933, APRIL SESSION, 1934

No. 5170

P. R. MALLORY & CO., INC., a Corporation,
Plaintiff,

vs.

GRIGSBY-GRUNOW COMPANY,
a Corporation,
Defendant.

MANUFACTURERS FINANCE COMPANY,
Appellant,

vs.

FRANK M. McKEY, as Trustee in Bankruptcy for the Estate of Grigsby-Grunow Company, a Corporation,
Appellee.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

Honorable
John P. Barnes,
Judge Presiding.

APPELLANT'S PETITION FOR REHEARING

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Honorable **John P. Barnes,** Judge Presiding.

APPELLANT'S PETITION FOR REHEARING

Comes now the appellant and respectfully petitions the Court for a rehearing in this cause, and in support of said petition presents the following points and arguments.

In effect, the Court in its opinion says:

1. That because appellant **ATTEMPTED** to collect compensation or interest in accordance with the terms of its contract, it should be penalized and forfeit all interest, be it at 28.3 per cent, the amount chargeable

according to the strict interpretation of the contract, or 20 per cent, the amount which the parties had been paying during all of their transactions and up to the appointment of the receivers.

2. That because appellant **ATTEMPTED** to recover $7,800 (which we deny) for attorneys' fees, no attorneys' fees at all should be allowed.

It must be borne in mind that from the nature of the proceedings appellant was required to intervene in this suit. Appellant did not choose the forum. It came into this equity proceeding because the receivers collected and retained moneys belonging to it. This is not the situation of a direct proceeding instituted in equity, wherein appellant was seeking the aid of the Court. It was merely a request that the Chancellor instruct his receiver not to appropriate moneys collected on accounts theretofore sold or pledged by the company. In its intervening petition it set forth its contract and its rights thereunder. To this petition an answer was filed by the receivers, in effect denying that receivers can be required to pay more than 7 per cent interest. The receivers filed no plea of usury and in their answer did not question the attorneys' fees. A motion to strike out the answer as insufficient was denied and a hearing was had on the issues thus joined. The learned trial Court denied relief to the finance company on the ground that 28 per cent interest is unconscionable and that attorneys' fees "in any considerable amount" should not have been incurred, making no decision as to what amount of interest in excess of 7 per cent is conscionable and not fixing any attorneys' fees whatsoever.

In its opinion this Court says:

> "We concede that the International Raw Material Corporation case is quite similar in many

respects to the case at bar. They do differ in the amount of attorneys' fees claimed and in the fact that in the instant case the finance company is **ATTEMPTING** to charge the receivers a rate considerably higher than the rate in fact used between the contracting parties which was the minimum rate reserved by the contract. * * * The **INSISTENCE** of appellant upon its claim for the full rate of interest, plus attorneys' fees at a preposterous rate, when it appeared that there was no more business to be done under the contract because of the receivership of the company, savors too much of the exaction of the pound of flesh from the creditors of the **INSOLVENT** company, to be enforced in a court of equity. * * * But where the creditor goes beyond the practice of the parties under the original contract and **TRIES** to enforce rights never asserted against the other contracting party, and in addition, **TRIES** to collect counsel fees exceeding 177% of the maximum amount claimed against the receiver, who is attempting to salvage the assets for the benefit of the other creditors who have a substantial interest in the estate of the debtor, we cannot feel that a court of equity is any place for him to press his demands." (Caps ours.)

Certainly, there is nothing in the foregoing language of the opinion which finds that any wrong was committed by the finance company. The sin apparently lies in the alleged **ATTEMPT** by the appellant to do certain things, or **TRYING** to enforce its rights, or **TRYING** to collect counsel fees. Evidently the Court is influenced considerably by the financial condition of the company because it finds in its opinion that the company was **INSOLVENT.** This is contrary to the record. The record discloses that at the time of the appointment of the receivers the company had **NET** assets of over $13,000,000 and was amply

solvent (Rec. 3). It is submitted that the finding by this Court that the company was insolvent is wholly erroneous. For the sake of the argument, we might concede that the company was insolvent, yet the law is not changed. There is a long and uninterrupted line of authorities in effect holding that neither the corporation nor those who succeed to its rights, nor its sureties, are heard to object to its bargain either at law or in equity, because of usury.

In re: International Raw Material Corp. (C. C. A. 2) 22 F. (2d) 920.

Curtis v. Leavitt, 15 N. Y. 9.

Stewart v. Bramhall, 71 N. Y. 85.

Gamble v. *Queens County Water Co.*, 123 N. Y. 108; 25 N. E. 201; 9 L. R. A. 527.

Hubbard v. *Tod*, 171 U. S. 474; 19 S. Ct. 14; 43 L. Ed. 246.

The Vigilancia (C. C. A. 2d Cir.) 73 F. 452.

These receivers were appointed by the Court for the purpose of operating the business, not to liquidate the same for the benefit of creditors, and were given power to:

> "Continue the business as a going concern; to operate the same and manage its properties and to do all things necessary in order to preserve said property and continue the business of said defendant, including * * * employing and discharging and fixing the compensation of all necessary employees, agents, servants and attorneys employed by said receivers and purchasing, from time to time on credit or otherwise, such supplies and equipment as may be necessary in the judgment of said receivers to enable them to continue said business as a going concern." (Rec. 8.)

In *Merchants & Manufacturers Securities Company* v. *Johnson*, 69 Fed. (2d) 940, with respect to the status of operating receivers, the Court held:

"The receiver was appointed, not to wind up the affairs of the Oil and Petroleum Companies, but to carry on their business as going concerns. He succeeds to the property of the companies subject to the same liens, limitations, restrictions, or contract rights as obtained at the time of his appointment. He has no greater or different rights than those that might have been asserted by the companies. *Fosdick* v. *Schall*, 99 U. S. 235, 25 L. Ed. 339, *In re*: Gotham Can Co., (C.C.A. 2) 48 Fed. (2d) 540; *Ramsey* v *Marlin Firearms Corp.* (D. C.) 14 Fed. (2d) 314; *Estes* v. *E. B. Estes & Sons*, (D. C.) 24 Fed. (2d) 756.

No mention is made by this Court of the case of *Merchants & Manufacturers Securities Company* v. *Johnson*, 69 Fed. (2d) 940, decided **MARCH 5, 1934**, by the Circuit Court of Appeals for the Eighth Circuit in which case identical contracts were before the Court. Interest at a much higher rate was involved. The proceeding was in equity, exactly like the instant case, and the finance company intervened. Among other things, the petition asked for the recovery of interest and attorneys' fees. The receiver defended on the grounds of usury and that the contracts were harsh, inequitable and unconscionable. Other questions were involved in that case not involved here. The finance company contended that the contracts were to be construed according to the laws of Illinois. With much gusto the receiver argued to the contrary, and relied on the *Reed case* as authority in this circuit. Ignoring that decision the Court held (p. 942):

"By statute of Illinois in effect during the time of all the transactions here involved, it was provided that, 'with respect to money loaned to or in any manner due and owing from a corporation, the parties may stipulate or agree upon any rate of interest whatsoever, and take and pay the same.' Smith-Hurd Rev. St. Ill. 1929, c. 74, Sec.

> 4, Cahill's Illinois Statutes, 1929 Ed., c. 74, Sec. 4, pp. 1594-1595. It is also provided by statute in Illinois that a corporation may 'borrow money at such rate of interest as the corporation may determine without regard to or restrictions under any usury law' of that state, and may 'mortgage or pledge its property, both real and personal, to secure the payment thereof.' Smith-Hurd Rev. St. Ill. 1929, c. 32, Sec. 6, Cahill's Illinois Statutes, 1929 Edition, c. 32, par. 6, p. 670."

And again at page 944 the Court said:

> "Appellant selected the state of Illinois as its principal place of business, as it had a right to do, and, that being its principal place of business, it had a legitimate interest in seeking the benefit of the laws of that state. **AS THE CONTRACTS, CONSTRUED BY THE LAWS OF ILLINOIS, WERE NOT USURIOUS, THE ASSIGNMENTS DELIVERED PURSUANT THERETO WERE LIKEWISE FREE FROM THE TAINT OF USURY."** (Caps ours.)

This Court holds that merely because appellant **ASKED** for interest or compensation as provided for in its contract, and reasonable attorneys' fees, it can recover nothing, the theory being that the rate of interest which the parties agreed upon was unconscionable and so harsh and oppressive as to be unenforceable in a court of equity. The finding by this Court that the insistence of appellant upon its claim for the full rate of interest, plus attorneys' fees, savors too much of the exaction of the pound of flesh from creditors of the alleged insolvent company, is wholly unwarranted. It smacks of a judicial spanking based upon speculation by this Honorable Court, and not based upon anything appearing in the record. The Court, in its opinion, recognizes the force of the arguments advanced by appellant to the effect that in Illi-

nois corporations are precluded from interposing the defense of usury and elaborates on the *International Raw Material Corporation case* decided by the 2nd Circuit.

It is respectfully submitted that in a case where no fraud is charged or proved and where two gigantic corporations deal through respective boards of directors at arm's length, a court of equity has no right to substitute its judgment for the judgment of the contracting parties, simply because the Court feels that the rate of interest is high. In *Poe* v. *Ulray*, 233 Ill. 56, a bill was filed in equity to set aside a lease as void on account of want of mutuality, and because it was unfair, harsh and unconscionable. The Supreme Court of Illinois said (p. 63):

> "So far as the charge that the contract was harsh and unjust is concerned, it may be said that the parties were competent to contract with each other, and neither side can be relieved from their agreements on the ground that they did not use good business judgment in entering into the contract. There is no question of fraud and no charge or evidence of fraud in the case, and where parties who are competent in law and in fact to enter into contracts, freely and voluntarily contract with each other, it is of the utmost importance to them, and the public as well, that their agreement shall be respected and enforced by the courts, and that neither shall be relieved from the obligation of his contract except upon some certain ground deemed valid by the law."

This Court, in its opinion, recognizes that many trial and reviewing Courts have upheld and enforced contracts identical with the one here involved where compensation or interest was calculated, not according to the moneys advanced, but on the amount of paper assigned. The decision in the *Reed case*, and

the opinion in the instant case, are in conflict with the decisions of these various courts. This Honorable Court disagrees with the opinions of the Justices in the First, Second, Third, Fourth, Fifth, Sixth and Eighth Circuits and disagrees with the United States Supreme Court in three important cases. It likewise ignores the Supreme Court of Illinois in its decision upholding the law which permits corporations to pay any rate of interest they choose. The contrary opinions appear as follows:

FIRST CIRCUIT.

Estes v. *E. B. Estes & Son*, 24 Fed. (2d) 756, (Mass. District Ct. 1927).

SECOND CIRCUIT

Ramsey v. *Marlin Firearms Co.*, 14 Fed. (2d) 341, Conn. District Court, 1925.

In re: International Raw Material Company, 22 Fed. (2d) 920 (1927).

In re: Rosenblatt, 299 Fed. 771, District Court of New York.

Boise v. *Talcott*, 264 Fed. 61.

In re: Gotham Can Company, 48 Fed. (2d) 540.

THIRD CIRCUIT.

In the matter of Lutz & Schramm Co., Inc., 38 Am. Bkptcy. 351 (1916), District Ct., Pa.

Brierly v. *Commercial Credit*, 43 Fed. (2d) 730 (1930).

FOURTH CIRCUIT.

Chapman v. *Emerson*, 8 Fed. (2d) 353.

FIFTH CIRCUIT.

United Divers v. *Commercial Credit Co.*, 289 Fed. 316 (1923).

SIXTH CIRCUIT.

LeSeuer v. *Manufacturers Finance Co.*, 285 Fed. 490 (1927).

EIGHTH CIRCUIT.

Merchants & Manufacturers Securities Co. v. *Johnson*, 69 Fed. (2d) 940; decided March 5, 1934.

UNITED STATES SUPREME COURT

Seaman v. *Philadelphia Warehouse Co.*, 274 U. S. 403.

Junction R. R. Co. v. *Bank of Ashland*, 79 U. S. 226 (12 Wall.).

Fosdick v. *Schall*, 99 U. S. 235, 25 L. Ed. 339.

SUPREME COURT OF ILLINOIS

Tennant v. *Joerns*, 329 Ill. 34.

The foregoing decisions, mainly equity cases, clearly hold that in states where corporations are by law precluded from interposing the defense of usury, irrespective of the rate of interest, these contracts are enforceable. To say that the rate of interest specified in the contract is shocking to the conscience of a Chancellor is rather an empty argument. It upsets rules of law firmly established and universally recognized. It takes from the legislature which enacted the law the power to legislate. It destroys contracts obviously legal. It takes away vested rights which the opinion states would be enforced in suits at law. It substitutes the Court's judgment in business transactions for that of the contracting parties, which is most unfair and inequitable. The Court does not indicate what rate of interest corporations may pay without fear of shocking the conscience. At what rate of interest does the conscience of a Chancellor

commence to shock? The argument that a Chancellor's conscience is shocked in a case of this kind, where interest alone is involved and where a corporation is by law precluded from interposing that defense, reminds one of what John Selden once said:

> "Equity in Law is ye same yt ye spirit is in Religion, what ever one pleases to make it. Some times they Goe according to conscience some time according to Law some time according to ye Practice of ye Court.
>
> Equity is A Roguish thing, for Law wee have a measure know what to trust too. Equity is according to ye conscience of him yt is Chancellor, and as yt is larger or narrower soe is equity Tis all one as if they should make ye Standard for ye measure wee call A foot, to be ye Chancellors foot; what an uncertain measure would this be: one Chancellor ha's a long foot another A short foot a third an indifferent foot; tis ye same thing in ye Chancellors Conscience."

With respect to attorneys' fees, it is respectfully urged that the finance company at no time asked for $7,800 as attorneys' fees. The intervening petition requested the allowance of **REASONABLE** attorneys' fees (Rec. 16). One witness gave his opinion as to the value of the services rendered by the attorneys for the finance company. To the contrary, nothing was offered by the receivers. At no time did appellant ask for that amount, and in fact, in its reply brief stated:

> "It is our contention that the appellees, by their action, compelled appellant to resort to the court, thus giving rise to the necessity for the employment of attorneys. Hence appellant is entitled to recover its reasonable attorneys' fees. There is no finding by the trial court fixing the amount of such attorneys' fees, although there is uncontradicted evidence in the record as to the value of the legal services rendered. (Rec. 29) The trial

court could have ignored the testimony of the expert witness as to the value of such services and fixed a reasonable sum, and this Honorable Court (Circuit Court of Appeals) is not bound by the opinion of the experts on this question. Under the authorities, if this court is not satisfied that the amount named by the witness is reasonable in view of all of the elements to be considered in determining that question, it has the power to fix whatever amount it determines to be reasonable. Appellant is not insisting upon the allowance of $7800.00, but is asking for the allowance of a reasonable sum."

The Court, in its opinion states:

"The **INSISTENCE** of appellant upon its claim for the full rate of interest plus attorneys' fees at a preposterous rate when it appeared that there was no more business to be done under the contract, etc."

and again,

"and in addition **TRIES** to collect counsel fees exceeding 177% of the maximum amount claimed against the receiver"

is certainly contrary to the record.

In its opinion this Court concedes that the *International Raw Material Corporation case* is identical with the instant decision and differs only in the amount of attorneys' fees claimed, and in the fact that in this case the finance company is attempting to charge the receivers a higher rate of interest than the rate in fact used between the contracting parties. In the *International case* $500 in fees was allowed, which amount was stated by the parties to be "concededly reasonable." The amount involved in the *International case* does not appear from the record, and it is difficult to determine what basis was used in determining the reasonableness of the fees. This Court

further concedes, in its opinion, that certain courts of appeal in other circuits, in *Estes* v. *E. B. Estes & Sons*, 24 F. (2d) 756; *Lutz & Schramm, Inc.*, 38 A. B. R. 351; *In re* Gotham Can Co., 48 F. (2d) 540; *Ramsey* v. *Merlin Firearms Co.*, 14 F. (2d) 314; *In re* Bernard & Katz, 38 F. (2d) 40, permitted the recovery of some attorneys' fees. Simply because a witness testified that in his opinion $7,800 was a reasonable fee, and notwithstanding the fact that the finance company pointed out to this Court and to the trial Court that Courts are not bound by the opinion of experts on these questions, yet the trial Court and this Honorable Court both conclude that nothing should be allowed. To us the action of this Court seems most inequitable, both on the question of a fair rate of interest and the allowance of reasonable attorneys' fees.

Apparently, to minimize the attorneys' fees, the Court points out as follows:

> "It was shown that there never was any question but that appellant would receive back the balance on its loan."

This, we insist, is incorrect. It was not shown on the trial that there never was any question but that appellant would receive back the balance of the loan, and on the contrary, it affirmatively appears from the record that there was considerable question as to whether or not the loan would be paid in full. The ultimate payment depended upon the collectibility of the assigned accounts from disgruntled distributors and dealers of the product manufactured by the company. This Court has evidently overlooked the testimony of George Whitfield, assistant treasurer of the company, who was employed at the time of the trial by the receivers as their chief accountant, wherein he said:

"At the time of the receivership the collections were practically at a stand-still and so remained for a week or ten days. After that collections were very small on account of the doubt in the minds of the distributors as to whether they should pay their bills or not. Toward thawing out these accounts there was an advertising appropriation of $35,000. There was considerable effort made to collect. Those accounts were placed with different employees of the company, particularly, Mr. Shadley, and the receivers went down and had a meeting with the Eastern distributors in New York in an effort to get loose some of the moneys because collections were just stopped." (Rec. 24.)

This testimony, which stands uncontradicted in the record, demonstrates that the receivers went to considerable lengths to enforce collection of the assigned accounts, and at that time there was grave doubt as to the ultimate collection by the finance company of its accounts in full.

In *Merchants & Manufacturers Securities Company* v. *Johnson*, 69 Fed. (2d) 940, the amount sought to be recovered by the finance company was $32,489.01 and in that case the Court said (p. 945):

"There is no finding by the lower court fixing the amount of such attorney fees, although there is evidence in the record as to the value of the legal services rendered. We have held that the judge of the trial or appellate court is an expert himself, and knows as well as a legal expert what are reasonable attorney fees. Neither the lower court nor this court is bound by the opinion of experts on this question. We are not satisfied that the amounts named by the witnesses called are reasonable, in view of all the elements to be considered in determining that question. As said by the Supreme Court *In re* Gilbert, 276 U. S. 294, 48 S. Ct. 309, 310, 72 L. Ed. 580: 'We are de-

sirous of making it clear by our action that the judges of the courts, in fixing allowances for services to court officers, should be most careful, and that vicarious generosity in such a matter could receive no countenance.'

"The question was not put in issue by any testimony produced by the appellee, presumably on the theory that no amount should in any event be allowed, or on the theory that the court could determine the reasonableness of the attorney fees from the record. But, as said by the Supreme Court in *Newton* v. *Consolidated Gas Co.*, 259 U. S. 101, 42 S. Ct. 438, 439, 66 L. Ed. 844, 'The rights of those who ultimately pay must be carefully protected.'

"We therefore fix the fees to be recovered by appellant at $3,000.00."

A careful study of the opinion convinces us that this Court has misapprehended the record and the law. In this record it is clear that the appellant did nothing more than to file its petition, asking for a construction of its contract. In the stipulation of facts it is stated (Rec. 65), that

"the compensation or interest of $4,394.48 claimed from November 24, 1933 to December 29, 1933 constitutes an average claim of 28.3% interest upon the average net balances outstanding. * * * Computation of interest or compensation at 20% from November 24, 1933 to December 29, 1933 upon outstanding balances of advances would be $3,096.22 or $1,296.26 less than the petitioner is claiming in this proceeding."

The Court could have adopted the practice of the parties prior to the appointment of the receivers and allowed interest at the rate of twenty per cent per annum. The Court misapprehended the record when it found that there never was any doubt but that appellant would receive back the balance of its loan. As

we have herein pointed out, there was grave doubt whether this would ever be done. Certainly, in such an instance, with more than a quarter of a million dollars at stake, appellant was entitled to the benefit of counsel. Under the terms of the contract reasonable attorneys' fees should not be denied simply because a member of the bar testified, in reply to questions put to him, that $7,800, in his judgment, was a reasonable fee, basing his conclusion, no doubt, on the fact that the amount involved was over $250,000, and notwithstanding that the appellant pointed out that the Court was not bound by that testimony and could fix whatever amount it determined to be reasonable. What we are driving at is that it is most unfair to penalize appellant simply because the rate of interest literally provided for by the contract is too high to satisfy the ideas of this Court, and simply because a witness testified that in his opinion $7,800 was a reasonable fee. Being in a court of equity and having committed no iniquity, certainly appellant is entitled to receive equity.

For the reasons herein stated, appellant respectfully petitions this Honorable Court for a rehearing in this matter.

Respectfully submitted,

EDWARD ROTHBART,
NORMAN M. PETERSON,
Attorneys for Appellant.

One N. LaSalle Street,
Chicago, Illinois.

And afterwards, to-wit: On the first day of October, 1934, the following further proceedings were had and entered of record, to-wit:

Monday October 1, 1934.

Court met pursuant to adjournment and was opened by proclamation.

Before:

Hon. Samuel Alschuler, Circuit Judge.
Hon. William M. Sparks, Circuit Judge.
Hon. Louis FitzHenry, Circuit Judge.

Manufacturers Finance Company,
5170 *vs.*
Frank M. McKey, as Trustee, Etc.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

It is ordered by the Court that the petition for a rehearing in this cause be, and the same is hereby denied.

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit, begun and held in the United States Court Room, in the City of Chicago, in said Seventh Circuit on the second day of October, 1934, of the October Term in the year of our Lord One Thousand Nine Hundred and Thirty-Four and of our Independence the One Hundred and Fifty-Ninth.

And on the same day, to-wit: On the second day of October, 1934 there was filed in the office of the Clerk of this court a petition for stay of mandate, which said petition is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

P. R. Mallory and Co., Inc., a corporation,
Plaintiff,
vs.
Grigsby-Grunow Company, a Corporation,
Defendant.

Manufacturers Finance Company, a corporation, Intervenor,
Appellant,
vs.
Thomas L. Marshall and LeRoi J. Williams, Receivers for Grigsby-Grunow Company,
Appellees.

Number—5170.

PETITION FOR APPLICATION FOR STAY OF MANDATE.

Now comes Manufacturers Finance Company, Petitioner, by Edward Rothbart and Norman M. Peterson, its attorneys, and makes application for an order of this Honorable Court staying the issuance of mandate in this cause until and including the 30th day of November, 1934, and if on or before the 30th day of November, 1934 there is filed with the Clerk of this Honorable Court a certificate of the Clerk of the Supreme Court of the United States that a petition for a writ of certiorari has been filed therein, the stay shall continue until the final disposition of this case by the Supreme Court.

Wherefore, it is prayed that this application be granted.

EDWARD ROTHBART,
NORMAN M. PETERSON.

Endorsed: Filed Oct. 2, 1934. Frederick G. Campbell, Clerk.